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# The Federal Taxing Power: A Primer

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**Milan N. Ball**  
Legislative Attorney

## The Federal Taxing Power: A Primer

The Taxing and Spending Clause of the U.S. Constitution provides Congress with the power to tax. The U.S. Supreme Court has interpreted Congress’s power to tax broadly, except for a few cases decided in the 1920s and 1930s, in which the Court invalidated taxes that were functionally regulatory penalties on the ground that they exceeded Congress’s legislative authority. But while the Taxing and Spending Clause grants Congress broad authority to lay and collect taxes, the Constitution also contains clauses that expressly circumscribe the taxing power.

The meanings of some of these express limitations appear evident, and thus are less subject to dispute. The Origination Clause requires legislation imposing taxes to begin in the U.S. House of Representatives. The Taxing and Spending Clause authorizes Congress to lay taxes for federal debts, the common defense, and the general welfare. Under the Export Clause, Congress may not tax articles exported from any state.

Much less clear are the meaning of, and distinction between, direct and indirect taxes. Pursuant to Article I, Section 2, clause 3 and Article I, Section 9, clause 4 of the U.S. Constitution, direct taxes are subject to the rule of apportionment, meaning Congress must set the total amount to be raised by the direct tax, then divide that amount among the states according to each state’s population. The lack of clarity surrounding the meaning of a direct tax ultimately led to the adoption of the Sixteenth Amendment, which authorizes Congress to impose taxes on income without regard to the rule of apportionment. Article I, Section 8, clause 1 of the U.S. Constitution subjects duties, imposts, and excise taxes—collectively referred to as indirect taxes—to the rule of uniformity. The rule of uniformity requires an indirect tax to operate in the same manner throughout the United States. The U.S. Supreme Court has not fully explained what, in its view, distinguishes direct taxes from indirect taxes.

In addition to raising revenue, Congress also uses its taxing power to regulate private conduct. In cases where Congress has enacted a “tax” to compel adherence to a regulatory scheme that it could not impose directly using its other enumerated powers, the question of whether the Supreme Court will uphold a “tax” under the taxing power turns on whether the Court views the “tax” as the functional equivalent of a regulatory penalty. In a few cases, the Court has invalidated penalties disguised as taxes because, in its view, they exceeded the scope of Congress’s taxing power. Central to this analysis is whether the characteristics of the “tax” are similar to traditional taxes and whether the “tax” is similar to a regulatory penalty in that it inflicts punishment for an unlawful act or omission.

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## Introduction

The Framers’ principal motivation for granting Congress the power to tax in the U.S. Constitution was to provide the national government with a mechanism to raise a “regular and adequate supply”<sup>1</sup> of revenue and pay its debts.<sup>2</sup> Under the predecessor Articles of Confederation, the national government had no power to tax and could not compel states to raise revenue for national expenditures.<sup>3</sup> The national government could requisition funds from states to place in the common treasury, but, under the Articles of Confederation, state requisitions were “mandatory in theory” only.<sup>4</sup> State governments resisted these calls for funds.<sup>5</sup> As a result, the national government raised “very little” revenue through state requisitions,<sup>6</sup> inhibiting its ability to resolve immediate fiscal problems, such as repaying its Revolutionary War debts.<sup>7</sup>

By contrast, the Constitution provides Congress with broad authority to lay and collect taxes. Article I, Section 8, clause 1 of the Constitution—commonly known as the Taxing and Spending Clause<sup>8</sup>—empowers Congress “To lay and collect Taxes, Duties, Impost and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all

<sup>1</sup> The FEDERALIST NO. 30 (Alexander Hamilton).

<sup>2</sup> Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 89 (2012); see *Veazie Bank v. Fenno*, 75 U.S. 533, 540 (1869) (“The [national government] had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property.”); Bruce Ackerman, *Taxation and the Constitution*, COLUM. L. REV. 1, 6 (1999) (“The [Federalists] would never have launched their campaign against America’s first Constitution, the Articles of Confederation, had it not been for its failure to provide adequate fiscal powers for the national government.”); see generally THE FEDERALIST NO. 30 (Alexander Hamilton) (advocating for a “General Power of Taxation”).

<sup>3</sup> See ARTICLES OF CONFEDERATION OF 1777, arts. II, VIII; Ackerman, *supra* note 2 at 6 (“The Articles of Confederation stated that the ‘common treasury . . . shall be supplied by the several States, in proportion to the value of all land within each State,’ Articles of Confederation art. VIII (1781), but did not explicitly authorize the Continental Congress to impose any sanctions when a state failed to comply. This silence was especially eloquent in light of the second Article’s pronouncement: ‘Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled.’”).

<sup>4</sup> CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION*, 15 (Cambridge University Press) (2005); see ARTICLES OF CONFEDERATION OF 1777, art. VIII.

<sup>5</sup> Johnson, *supra* note 4, at 16 (“Some states simply ignored the requisitions. Some sent them back to Congress for amendment, more to the states’ liking. New Jersey said it had paid enough tax by paying the tariffs or ‘imposts’ on goods imported through New York or Philadelphia and it repudiated the requisition in full.”).

<sup>6</sup> Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1202 (2012); see, e.g., Johnson, *supra* note 4, at 15 (“In the requisition of 1786—the last before the Constitution—Congress mandated that states pay \$3,800,000, but it collected only \$663.”); see Metzger, *supra* note 2, at 89 (“Under the Articles of Confederation, states had failed to meet congressional requisitions on a massive scale and Congress was bankrupt.”).

<sup>7</sup> Johnson, *supra* note 4, at 16–17 (“Congress’s Board of Treasury had concluded in June 1786 that there was ‘no reasonable hope’ that the requisitions would yield enough to allow Congress to make payments on the foreign debts, even assuming that nothing would be paid on the domestic war debt. . . . Almost all of the money called for by the 1786 requisition would have gone to payments on the Revolutionary War debt. French and Dutch creditors were due payments of \$1.7 million, including interest and some payment on the principal. Domestic creditors were due to be paid \$1.6 million for interest only. Express advocacy of repudiation of the federal debt was rare, but with the failure of requisitions, payment was not possible. . . . Beyond the repayment of war debts, the federal goals were quite modest. The operating budget was only about \$450,000 . . . . Without money, however, the handful of troops on the frontier would have to be disbanded and the Congress’ offices shut.”); see Cooter & Siegel, *supra* note 6 at 1204.

<sup>8</sup> See, e.g., *United States v. Richardson*, 418 U.S. 166, 169–70 (1974).

Duties, Imposts and Excises shall be uniform throughout the United States.”<sup>9</sup> The U.S. Supreme Court has described Congress’s power to tax as “very extensive.”<sup>10</sup>

Supreme Court Chief Justice Salmon P. Chase famously described the taxing power in the *License Tax Cases*:

It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.<sup>11</sup>

The Constitution provides several express limits on the manner in which taxes may be imposed. First, legislation imposing taxes must originate in the House of Representatives.<sup>12</sup> Second, the Constitution precludes Congress from taxing articles exported from any state.<sup>13</sup> Third, while Congress may impose “[c]apitation, or other direct[] Tax[es],”<sup>14</sup> the Constitution requires such taxes to be “apportioned among the several States . . . according to their respective” populations.<sup>15</sup> Fourth, Congress may impose other “Taxes, Duties, Imposts and Excises,” collectively referred to as *indirect* taxes, but they must “be uniform throughout the United States.”<sup>16</sup> Fifth, the Constitution authorizes taxes for debts, defense and the general welfare.<sup>17</sup>

The Supreme Court has also examined the scope of Congress’s taxing power in the context of cases challenging Congress’s ability to regulate private conduct.<sup>18</sup> The Court has held that taxes that are functionally regulatory penalties exceed the scope of Congress’s taxing power.<sup>19</sup> In determining whether a tax is the functional equivalent of a regulatory penalty, the Court has

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<sup>9</sup> U.S. CONST. art. I, § 8, cl. 1; *see also id.* art. I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

<sup>10</sup> *License Tax Cases*, 72 U.S. 462, 471 (1866); *see also* *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (“It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect . . . . As is well known, the constitutional restraints on taxing are few.”); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 12 (1916) (“That the authority conferred upon Congress by § 8 of article 1 ‘to lay and collect taxes, duties, imposts and excises’ is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine.”); *Austin v. Aldermen*, 74 U.S. (7 Wall.) 694, 699 (1869) (“The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.”); *see generally* *Veazie Bank v. Fenno*, 75 U.S. 533, 540 (1869) (explaining “[N]othing is clearer, from the discussions in the [Constitutional] Convention and the discussions which preceded final ratification [of the Constitution] by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.”).

<sup>11</sup> *License Tax Cases*, 72 U.S. at 471.

<sup>12</sup> U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

<sup>13</sup> *Id.* art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

<sup>14</sup> *Id.* art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.”).

<sup>15</sup> *Id.* art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .”).

<sup>16</sup> *Id.* art. I, § 8, cl. 1; *see also* *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911) (“[T]he terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution.”).

<sup>17</sup> *Id.* art. I, § 8, cl. 1.

<sup>18</sup> *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563–74 (2012) [hereinafter *NFIB*].

<sup>19</sup> *See, e.g.*, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

looked to whether the “tax” has characteristics similar to traditional taxes and whether the “tax,” like a regulatory penalty, inflicts punishment for an unlawful act or omission.<sup>20</sup>

This report summarizes express constitutional limits on Congress’s taxing power and discusses the scope of Congress’s taxing power in the context of cases challenging regulatory taxes.

## The Origination Clause

Article I, Section 7, clause 1 of the U.S. Constitution provides, “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”<sup>21</sup> This clause is known as the Origination Clause.<sup>22</sup> It requires revenue measures to originate in the U.S. House of Representatives, not the U.S. Senate.<sup>23</sup>

Federal courts’ Origination Clause jurisprudence is based on two principal interpretations. First, the phrase “All Bills for raising Revenue” refers to all legislation with the primary purpose of raising revenue to support the government generally—“meeting the expenses or obligations of the Government”<sup>24</sup>—rather than legislation for the specific purpose of creating and funding a discrete government program.<sup>25</sup> Second, when referring to tax legislation, the phrase “raising Revenue” encompasses all tax legislation regardless of whether the estimated net revenue effect of the legislation is an increase or decrease in revenue.<sup>26</sup>

<sup>20</sup> *NFIB*, 567 U.S. at 563–68.

<sup>21</sup> U.S. CONST. art. I, § 7, cl. 1; *see, e.g.*, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (holding the Senate’s substitution of an inheritance tax for a corporate income tax did not violate the Origination Clause because the Senate’s amendment to the House of Representative’s bill for raising revenue was germane to the subject matter).

<sup>22</sup> *See, e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 387 (1990).

<sup>23</sup> *See, e.g.*, *Hubbard v. Lowe*, 226 F. 135, 141 (S.D.N.Y. 1915) (holding the Cotton Futures Act was unconstitutional because the act did not originate in the House of Representatives), appeal dismissed, 242 U.S. 654 (1917). The U.S. Supreme Court dismissed the government’s appeal after “Congress mooted the issue by simply passing the same tax bill again in proper order.” *United States v. Madison*, 712 F. Supp. 1379, 1380 (W.D. Wis. 1989); *see* *Lowe v. Hubbard*, 242 U.S. 654 (1917).

<sup>24</sup> *Twin City Nat. Bank of New Brighton v. Nebeker*, 167 U.S. 196, 203 (1897).

<sup>25</sup> *Munoz-Flores*, 495 U.S. at 398–401; *see e.g.* *Millard v. Roberts*, 202 U.S. 429, 436–37 (1906) (holding legislation levying property taxes in the District of Columbia for the express purpose of financing railroad projects was not a “Bill[] for raising Revenue” within the meaning of the origination clause because the legislation raised revenue for a specific purpose, railroad projects.); *Twin City Nat. Bank of New Brighton*, 167 U.S. at 202 (holding “a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives.”); *see also id.* at 202–03 (“Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue.” (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 880)). The House’s primary method of enforcing the Origination Clause is called “blue-slipping,” the act of the House returning a measure to the Senate that the House has determined violates the Origination Clause. *See* CRS Report RS21236, *Blue-Slipping: Enforcing the Origination Clause in the House of Representatives*, by James V. Saturno.

<sup>26</sup> *See, e.g.*, *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) (“The term ‘Bills for raising Revenue’ does not refer only to laws increasing taxes, but instead refers in general to all laws relating to taxes.”); *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam) (“We cannot agree that ‘revenue-raising’ means only bills that increase taxes.”); *but c.f.* *Bertelsen v. White*, 65 F.2d 719, 722 (1st Cir. 1933) (holding a provision did not fall within the meaning of the phrase “Bill[] for raising Revenue” as the provision’s “primary object [was] ‘to establish the American merchant marine upon a sound and permanent basis,’” but also noting, “It is not a bill to raise revenue. On the contrary, it diminishes the revenue of the government”).

In *United States v. Munoz-Flores*, the Supreme Court held a monetary special assessment in the Victims of Crime Act of 1984<sup>27</sup> did not violate the Origination Clause, even though the Act originated in the Senate and created revenue for the U.S. Treasury’s general fund incidental to its primary purpose, because it was not a “Bill[] for raising Revenue.”<sup>28</sup> The act contained several measures to provide income to the Crime Victims Fund, including the monetary special assessment.<sup>29</sup> The act specified that once the total income of the fund exceeded \$100 million, the excess would be placed in Treasury’s general fund.<sup>30</sup>

In reaching its decision, the Supreme Court restated the rule for determining when a bill constitutes a “Bill[] for raising Revenue.”<sup>31</sup> Specifically, “a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a ‘Bil[l] for raising Revenue’ within the meaning of the Origination Clause.”<sup>32</sup> Applying this rule, the Court determined that the monetary special assessment provision was not a “Bill[] for raising Revenue.”<sup>33</sup> The fact that funds in excess of \$100 million would, under the statute, be deposited in the Treasury’s general fund did not alter the Court’s conclusion.<sup>34</sup> Only a small percentage of that excess would be attributable to the special assessment.<sup>35</sup> Moreover, the act’s legislative history showed that Congress did not expect that the Treasury’s general fund would receive a substantial amount of revenue from Crime Victim Fund’s surpluses.<sup>36</sup> The Court found that “[a]ny revenue for the general Treasury that [the monetary special assessment] creates is thus ‘incidenta[l]’ to that provision’s primary purpose.”<sup>37</sup>

Several lower courts in the 1980s heard cases in which taxpayers challenged the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) on the ground that TEFRA’s passage violated the Origination Clause.<sup>38</sup> The tax bill introduced by the House of Representatives would have yielded an estimated net loss of almost \$1 billion over five years.<sup>39</sup> Upon arrival in the Senate, the Senate struck out all of the provisions except for the enacting clause and added provisions estimated to provide a net revenue increase of about \$100 billion over three years.<sup>40</sup> Because only the Senate version of TEFRA would have yielded a net revenue

<sup>27</sup> 42 U.S.C. §§ 10601–04 (1984).

<sup>28</sup> *Munoz-Flores*, 495 U.S. at 398–401; *see generally* U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 3 (2005) (defining “General Fund Accounts” as “Accounts in the U.S. Treasury holding all federal money not allocated by law to any other fund account.”).

<sup>29</sup> *Munoz-Flores*, 495 U.S. at 398.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (alteration in original).

<sup>33</sup> *Id.* at 401.

<sup>34</sup> *Id.* at 398–400.

<sup>35</sup> *Id.* at 399.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (third alteration in original).

<sup>38</sup> *See, e.g.*, *Tex. Ass’n. of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 165 (5th Cir. 1985), *cert denied*, 106 S. Ct. 2265 (1986); *Armstrong v. United States*, 759 F.2d 1378, 1380–81 (9th Cir. 1985); *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam); *Heitman v. United States*, 753 F.2d 33, 35 (6th Cir. 1984) (per curiam); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del. 1984), *aff’d without opinion*, 749 F.2d 27 (3d Cir. 1984).

<sup>39</sup> H.R. REP. NO. 97-404, at 38 (1981).

<sup>40</sup> S. REP. NO. 97-494, pt. 2, at 79 (1982); *Tex. Ass’n. of Concerned Taxpayers*, 772 F.2d at 164; *Armstrong*, 759 F.2d at 1381; *see also* U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; *but the Senate may propose or concur with Amendments as on other Bills.*” (emphasis added)); *Flint v.*

increase, the taxpayers challenging the statute argued that TEFRA originated in the Senate as a bill to raise revenue, in violation of the Origination Clause.<sup>41</sup> The courts hearing these challenges to TEFRA embraced an expansive interpretation of the phrase “raising Revenue,” concluding that all legislation relating to taxes was legislation that “rais[ed] revenue” within the meaning of the Origination Clause and upheld TEFRA as constitutional.<sup>42</sup>

## The Export Clause

Article 1, Section 9, clause 5 of the U.S. Constitution prohibits Congress from laying taxes and duties on articles exported from any state.<sup>43</sup> This clause is known as the Export Clause.<sup>44</sup> The Export Clause applies to taxes and duties, not user fees.<sup>45</sup> The U.S. Supreme Court has interpreted the Export Clause to address shipments only to foreign countries, not shipments to unincorporated territories, such as Puerto Rico and the Commonwealth of the Northern Mariana Islands.<sup>46</sup> The

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Stone Tracy Co., 220 U.S. 107, 143 (1911) (“In the Senate the proposed [inheritance] tax was removed from the [House] bill, and the corporation tax, in a measure, substituted therefor. The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill and not beyond the power of the Senate to propose.”).

<sup>41</sup> *Tex. Ass’n. of Concerned Taxpayers*, 772 F.2d at 165, *Armstrong*, 759 F.2d at 1381; *Wardell*, 757 F.2d at 205.

<sup>42</sup> *See, e.g., Armstrong*, 759 F.2d at 1380; *Wardell*, 757 F.2d at 205; *see also Tex. Ass’n. of Concerned Taxpayers*, 772 F.2d at 166 (recognizing “all contemporary courts have adopted the construction apparently given it by Congress, i.e. ‘relating to revenue’” as opposed to increasing revenue, but ruling that the challenge raised a “nonjusticiable political question.”); *Heitman*, 753 F.2d at 35 (“The Senate may amend bills originating in the House as long as the bill remains germane to the subject matter of the bill. *Flint v. Stone Tracy Co.*, 220 U.S. 107[] (1911). TEFRA was not passed in violation of this principle as it remained a revenue bill after the Senate amended the Act.”); *Rowe*, 583 F. Supp. at 1519 (“Once a bill has passed the House, the Court perceives no constitutional reason why the Senate may not make amendments germane to the subject matter of the legislation.”).

<sup>43</sup> U.S. CONST. art. I, § 8, cl. 1; *see, e.g., United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (holding an ad valorem tax directly imposed on the value of cargo loaded at U.S. ports for export violated the Export Clause); *see Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1364 (Fed. Cir. 2000) (holding the Export Clause did not preclude a tax on passengers because they were not “articles” for the purposes of the Export Clause), *cert denied*, 530 U.S. 1274 (2000).

<sup>44</sup> *See, e.g., U.S. Shoe*, 523 U.S. at 362.

<sup>45</sup> *Id.* at 363 (“The [Export] Clause, however, does not rule out a ‘user fee,’ provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits.” (citing *Pace v. Burgess*, 92 U.S. 372 (1876))). In general, a user fee is a charge imposed on the user of a government service with the primary purpose of offsetting the costs of that government service. *See, e.g., Pace*, 92 U.S. 375–76 (“The stamp [tax] was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. . . . We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned . . . . The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. . . . [W]e cannot say that the charge imposed is excessive, or that it amounts to an infringement of the [Export Clause]. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.”).

<sup>46</sup> *Dooley v. United States*, 183 U.S. 151, 153–54 (1901); *see also Swan & Finch Co. v. United States*, 190 U.S. 143, 144–45 (1903) (explaining “‘export’ as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country.”); *see generally* Christina Duffy Burnett, *United States:*

Court has also construed the Export Clause as requiring “not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens” the process of exporting.<sup>47</sup>

For example, in *United States v. IBM*, the Supreme Court held that an excise tax<sup>48</sup> on insurance premiums paid to foreign insurers for policies insuring exported goods was unconstitutional under the Export Clause.<sup>49</sup> In *IBM*, the parties agreed that the facts and issue before the Court were largely indistinguishable from an earlier case, *Thames & Mersey Marine Insurance Co. v United States*,<sup>50</sup> in which the Court held that a tax on insuring exports was “functionally the same” as a tax on exports.<sup>51</sup> Applying stare decisis principles, the Court declined to overrule *Thames & Mersey Marine Insurance* absent additional briefing from the parties on whether the insurance policies subject to the excise tax were “so closely connected to the goods that the tax is, in essence, a tax on exports.”<sup>52</sup>

The Supreme Court has ruled that the Export Clause’s restriction on the taxing power does not extend to several taxes, such as a tax on all property alike, including property intended for export but not in the “course of exportation”;<sup>53</sup> a nondiscriminatory tax on an exporter’s income;<sup>54</sup> and a stamp tax to identify goods intended for export.<sup>55</sup>

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*American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 800 (2005) (explaining the U.S. Supreme Court’s doctrine of territorial incorporation “divided domestic territory . . . into two categories: those places ‘incorporated’ into the United States and forming an integral part thereof (including the states, the District of Columbia, and the ‘incorporated territories’); and those places not incorporated into the United States, but merely ‘belonging’ to it (which came to be known as the ‘unincorporated territories’)”).

<sup>47</sup> *Fairbank v. United States*, 181 U.S. 283, 293 (1901); see *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 173 (1918) (“And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it ‘so directly and closely’ bears on the ‘process of exporting’ as to be in substance a tax on the exportation.” (quoting *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 25 (1915))).

<sup>48</sup> *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945) (an excise tax is a tax laid “upon particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.”).

<sup>49</sup> *United States v. IBM*, 517 U.S. 843, 854–56 (1996).

<sup>50</sup> 237 U.S. at 27 (holding “proper insurance during the voyage is one of the necessities of exportation” and that “the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves.”).

<sup>51</sup> *IBM*, 517 U.S. at 850, 854.

<sup>52</sup> *Id.* at 855–56; see *id.* at 855 (“[T]he marine insurance policies in *Thames & Mersey* arguably ‘had a value apart from the value of the goods.’ Nevertheless, the Government apparently has chosen not to challenge that aspect of *Thames & Mersey* in this case. When questioned on that implicit concession at oral argument, the Government admitted that it ‘chose not to’ argue that [the excise tax] does not impose a tax on the goods themselves.”) (citations omitted).

<sup>53</sup> *Turpin v. Burgess*, 117 U.S. 504, 507 (1886) (“But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. . . . In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer.”).

<sup>54</sup> *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 174–75 (1918) (holding the Export Clause did not shield an exporter from an income tax laid generally on net incomes because the tax was laid on the exporter’s income from exportation).

<sup>55</sup> *Pace v. Burgess*, 92 U.S. 372, 376 (1876) (finding the stamp tax imposed was not a tax or duty, but a fee).

## Direct Taxes and the Rule of Apportionment

The U.S. Constitution subjects direct taxes to the rule of apportionment.<sup>56</sup> Though the U.S. Supreme Court has not clearly distinguished direct taxes from indirect taxes, the Court has identified capitation taxes—a tax “paid by every person, ‘without regard to property, profession, or any other circumstance’”—and taxes on real and personal property as direct taxes.<sup>58</sup> Under the rule of apportionment, Congress sets the total amount to be raised by a direct tax, then divides that amount among the states according to each state’s population.<sup>59</sup> Thus, a state with one-twentieth of the Nation’s population would be responsible for one-twentieth of the total amount of direct tax without regard to that state’s income or wealth levels.<sup>60</sup>

The Supreme Court first interpreted the Constitution’s “direct tax” language shortly after the Nation’s founding, in *Hylton v. United States*.<sup>61</sup> *Hylton* presented the question of whether an unapportioned tax on carriages was a “direct tax,” and therefore unconstitutional.<sup>62</sup> In three separate opinions, the deciding justices<sup>63</sup> each held that the tax was not “direct” within the meaning of the Constitution and suggested that the term “direct taxes” applied only to a narrow class of taxes that includes (1) capitation taxes<sup>64</sup> and (2) taxes on “land.”<sup>65</sup>

In *Hylton*, the Supreme Court adopted a functional approach to determine whether a tax is direct, focusing on whether the tax at issue can be apportioned and, if so, whether apportionment would produce significant inequities among taxpayers.<sup>66</sup> As Justice Samuel Chase stated in his opinion, “If [a tax] is proposed to tax any specific article by the rule of apportionment, and it would

<sup>56</sup> U.S. CONST. art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.”); *id.* art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . .”).

<sup>57</sup> *NFIB*, 567 U.S. at 571 (emphasis omitted) (citing *Hylton v. United States*, 3 U.S. 171, 175 (1796) (opinion of Chase, J.)).

<sup>58</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895); *Hylton v. United States*, 3 U.S. 171 (1796); *see also NFIB*, 567 U.S. 519, 571 (2012) (holding that the individual mandate provision in the Patient Protection and Affordable Care Act was not a direct tax because it did “not fall within” any of the “recognized categor[ies]” of direct taxes, capitation taxes and taxes on real or personal property).

<sup>59</sup> *See, e.g.*, Act of Aug. 5, 1861, ch. 45, 12 Stat. 292; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164.

<sup>60</sup> Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes”*, 33 ARIZ. ST. L.J. 1057, 1067 (2001).

<sup>61</sup> *Hylton*, 3 U.S. 171.

<sup>62</sup> 3 U.S. at 172. The tax at issue in *Hylton* imposed a specific yearly sum on carriages. Act of June 5, 1794, ch. 45, 1 Stat. 373, 374 (1794). The amount varied between one and ten dollars, depending on the type of carriage. *Id.* The tax exempted carriages used in husbandry or for the transportation of goods, wares, merchandise, produce, or commodities. *Id.*

<sup>63</sup> Only four of the six Justices who comprised the Supreme Court at the time participated in the *Hylton* argument—Associate Justices Chase, Paterson, Iredell, and Wilson. Consistent with the Court’s practice during that period, Justices Chase, Paterson, and Iredell each wrote a separate, or “seriatim,” opinion holding the tax to be constitutional. *See Hylton*, 3 U.S. at 172–83; M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 303–11 (2007). Justice Wilson abstained from voting on the case because he had previously expressed an opinion on the issue while serving as a circuit court judge and because the unanimity of the remaining three participating Justices made his opinion unnecessary. *See Hylton*, 3 U.S. at 183–84.

<sup>64</sup> *See NFIB*, 567 U.S. at 571 (citing *Hylton*, 3 U.S. at 175 (opinion of Chase, J.)).

<sup>65</sup> *Hylton*, 3 U.S. at 174–75 (opinion of Chase, J.); *id.* at 176–77 (opinion of Paterson, J.); *id.* at 183 (opinion of Iredell, J.).

<sup>66</sup> 3 U.S. at 174 (opinion of Chase, J.); *id.* at 179–80 (opinion of Paterson, J.); *id.* at 181–83 (opinion of Iredell, J.).

evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.”<sup>67</sup> As the Court recently explained its holding in *Hylton*, the “Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State.”<sup>68</sup> The Court in *Hylton* did not, however, offer a comprehensive definition of the types of taxes that are “direct.”<sup>69</sup>

The Supreme Court expanded on its interpretation of direct taxes in its two decisions in *Pollock v. Farmers’ Loan & Trust Co.*,<sup>70</sup> holding that taxes on real *and* personal property, and income derived from them, were direct taxes.<sup>71</sup> These decisions significantly altered the Court’s direct tax jurisprudence. In *Pollock*, the Court considered whether provisions in an 1894 act that imposed unapportioned taxes on income derived from both real and personal property were direct taxes.<sup>72</sup> The Court adopted two primary holdings regarding the scope of the Constitution’s “direct tax” clause. First, the Court held that taxes on real estate and personal property are direct taxes.<sup>73</sup> Second, the Court held that a tax on income *derived from* real or personal property—as opposed to income derived from employment or some other source<sup>74</sup>—is, in effect, a tax imposed directly on the property itself and is also a direct tax.<sup>75</sup> Applying these holdings, the Court held that the provisions before it were unconstitutional because they were unapportioned taxes on income derived from real and personal property.<sup>76</sup>

The *Pollock* Court concluded that its holding did not conflict with the Court’s prior decisions interpreting the direct tax language.<sup>77</sup> The Court reasoned that each of those decisions had sustained unapportioned taxes as either “excises” or “duties” imposed on a particular use of, or privilege associated with, the property in question, not as a tax on the property itself.<sup>78</sup> As to

<sup>67</sup> *Id.* at 174.

<sup>68</sup> *NFIB*, 567 U.S. at 570; *see Hylton*, 3 U.S. at 179 (opinion of Paterson, J.) (“A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would be absurd, and inequitable.”).

<sup>69</sup> *Contra Springer v. United States*, 102 U.S. 586, 602 (1880) (“Our conclusions are, that *direct taxes, within the meaning of the Constitution, are only* capitation taxes, as expressed in that instrument, and taxes on real estate.” (emphasis added)); *but see Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895) (holding taxes on personal property are also direct taxes).

<sup>70</sup> 158 U.S. 601 (1895) [hereinafter *Pollock II*]; 157 U.S. 429 [hereinafter *Pollock I*]. *Pollock* came to the Court twice. In *Pollock I*, the Court invalidated the tax at issue insofar as it was a tax upon income derived from real property, but the Court was equally divided on whether income derived from personal property was a direct tax. 157 U.S. at 583, 586. In *Pollock II*, on petitions for rehearing, the Court held that a tax on income derived from personal property was also a direct tax. 158 U.S. at 637. For simplicity, the main body of this report refers to the two decisions collectively as the “*Pollock*” decision.

<sup>71</sup> *Pollock II*, 158 U.S. 601; *Pollock I*, 157 U.S. 429.

<sup>72</sup> *Pollock II*, 158 U.S. at 618; *Pollock I*, 157 U.S. at 558; *see* Act of Aug. 27, 1894, ch. 349, 28 Stat. 509.

<sup>73</sup> *Pollock II*, 158 U.S. at 628; *Pollock I*, 157 U.S. at 580–81.

<sup>74</sup> The Court stated that its holding did not extend to income or other gains derived from “business, privileges, or employments.” *Pollock II*, 158 U.S. at 635.

<sup>75</sup> *Pollock I*, 157 U.S. at 581 (“An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.”); *Pollock II*, 158 U.S. at 628 (applying “the same reasoning . . . to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom”).

<sup>76</sup> *Pollock II*, 158 U.S. at 637; *Pollock I*, 157 U.S. at 583.

<sup>77</sup> *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80.

<sup>78</sup> *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80.

*Hylton* specifically, the Court determined that it had upheld the unapportioned carriage tax as an “excise” on the “expense” or “consumption” of carriages, rather than as a tax on carriage ownership.<sup>79</sup>

*Pollock*’s holding and rationale were later limited in several respects.<sup>80</sup> Most prominently, Congress passed and the states ratified the Sixteenth Amendment in direct response to *Pollock*’s prohibition on the unapportioned taxation of income derived from real or personal property.<sup>81</sup> The Sixteenth Amendment authorized Congress “to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states.”<sup>82</sup> Further, while the Court in *Pollock* held that a tax on income derived from property was indistinguishable from a tax on the property itself, the Court later rejected that reasoning in *Stanton v. Baltic Mining Company*, upholding an unapportioned tax on a mine’s income as being “not a tax upon property as such . . . , but a true excise levied on the results of the business of carrying on mining operations.”<sup>83</sup> The Court opined:

[T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.<sup>84</sup>

Despite these developments, it does not appear that the Supreme Court has overruled *Pollock*’s central holding that a tax on real or personal property solely because of its ownership is a direct tax.<sup>85</sup> In 1920, the Court relied on *Pollock* in *Eisner v. Macomber* to hold unconstitutional an unapportioned tax on shares issued as stock dividends.<sup>86</sup> There, the Court addressed whether a corporation’s issuance of additional shares to a stockholder as stock dividends was “income” under the Sixteenth Amendment and, if not, whether a tax on those unrealized gains was a direct tax.<sup>87</sup> After concluding that the stock dividends were not “income,”<sup>88</sup> the Court relied on *Pollock* to conclude that the tax was a direct tax.<sup>89</sup>

<sup>79</sup> *Pollock II*, 158 U.S. at 627 (“What was decided in the *Hylton* Case was, then, that a tax on carriages was an excise, and therefore an indirect tax.”).

<sup>80</sup> Jensen, *supra* note 60, at 1073.

<sup>81</sup> *Id.*; Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW. 3 (1987).

<sup>82</sup> U.S. CONST. amend. XVI (emphasis added).

<sup>83</sup> 240 U.S. 103, 112–14 (1916).

<sup>84</sup> *Id.* at 112–13 (citing *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916)).

<sup>85</sup> See *Union Elec. Co. v. United States*, 363 F.3d 1292, 1299 (Fed. Cir. 2004) (“We agree that *Pollock* has never been overruled, though its reasoning appears to have been discredited.”); see also *NFIB*, 567 U.S. 519, 571 (2012) (“In 1895, [in *Pollock II*,] we expanded our interpretation [of direct taxes] to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes” (citations omitted)).

<sup>86</sup> *Eisner v. Macomber*, 252 U.S. 189, 219 (1920).

<sup>87</sup> *Id.* at 201–19.

<sup>88</sup> *Id.* at 201–17. *Eisner* defined “income” as “the gain derived from capital, labor, or from both combined” *Id.* at 207 (internal quotation marks omitted).

<sup>89</sup> 252 U.S. at 218–19.

The Court determined that the limitation on Congress’s taxing power identified in *Pollock* “still has an appropriate and important function . . . not to be overridden by Congress or disregarded by the courts.”<sup>90</sup> The Court observed that the Sixteenth Amendment must be “construed in connection with the taxing clauses of the original Constitution and the effect attributed to them,” including *Pollock*’s holding that “taxes upon property, real and personal,” are direct taxes.<sup>91</sup> Applying that limitation, the Court held that the tax before it was unconstitutional because it was an unapportioned tax on personal property.<sup>92</sup>

In practical terms, the rule of apportionment for direct taxes means that Congress sets the amount to be raised by the direct tax, then divides that amount among the states by reference to each state’s population.<sup>93</sup> An 1861 federal tax on real property illustrates the operation of the rule of apportionment.<sup>94</sup> Congress enacted a direct tax of \$20 million.<sup>95</sup> After apportioning the direct tax among the states, territories, and the District of Columbia, the State of New York was liable for the largest portion of the tax, \$2,603,918.67,<sup>96</sup> and the Territory of Dakota was liable for the least, \$3,241.33.<sup>97</sup> The act called for the President to assign collection districts to states, territories, and the District of Columbia to apportion “to each county and State district its proper quota of direct tax”<sup>98</sup> and determine the amounts taxpayers in each collection district would be required to pay.<sup>99</sup>

## Indirect Taxes and the Rule of Uniformity

The U.S. Constitution requires that duties, imposts, or excise taxes—collectively referred to as *indirect* taxes—be “uniform throughout the United States.”<sup>100</sup> An indirect tax satisfies the Uniformity Clause “only when the tax ‘operates with the same force and effect in every place where the subject of it is found.’”<sup>101</sup> In general, an indirect tax does not violate the Uniformity Clause where the subject of the indirect tax is described in nongeographical terms.<sup>102</sup> If Congress

<sup>90</sup> *Id.* at 206.

<sup>91</sup> *Id.* at 205–06; *id.* at 218–19.

<sup>92</sup> *Id.* at 219.

<sup>93</sup> See *Hylton v. United States*, 3 U.S. 171, 174 (1796).

<sup>94</sup> Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294; see also Act of Jan. 9, 1815, ch. 21, 3 Stat. 164.

<sup>95</sup> Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294.

<sup>96</sup> *Id.* at 295 (“To the State of New York, two million six hundred and three thousand nine hundred and eighteen and two-third dollars.”).

<sup>97</sup> *Id.* at 296 (“To the Territory of Dakota, three thousand two hundred and forty-one and one-third dollars.”).

<sup>98</sup> *Id.* at 301.

<sup>99</sup> *Id.* at 296 (“That, for the purpose of assessing the above tax and collecting the same, the President of the United States be, and he is hereby authorized, to divide, respectively, the States and Territories of the United States and the District of Columbia into convenient collection districts, and to nominate and, by and with the advice of the Senate, to appoint an assessor and a collector for each such district, who shall be freeholders and resident within the same.”); *id.* at 302 (“[T]he said assessors, respectively, shall make out lists containing the sums payable according to the provisions of this act upon every object of taxation in and for each collection district; which lists shall contain the name of each person residing within the said district, owning or having the care or superintendence of property lying within the said district which is liable to the said tax.”).

<sup>100</sup> U.S. CONST. art. I, § 8, cl. 1; see *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911) (“[T]he terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution.”).

<sup>101</sup> *United States v. Ptasynski*, 462 U.S. 74, 82 (1983) (quoting *Edye v. Robertson*, 112 U.S. 580, 594 (1884)).

<sup>102</sup> *Ptasynski*, 462 U.S. at 84; see, e.g., *Knowlton v. Moore*, 178 U.S. 41, 106 (1900).

uses geographical terms to describe the subject of the indirect tax, then the U.S. Supreme Court “will examine the classification closely to see if there is actual geographic discrimination.”<sup>103</sup>

In the Supreme Court’s first hearing of *Pollock*, the Court was divided on whether the statutes enacting the federal income tax<sup>104</sup> violated the Uniformity Clause.<sup>105</sup> Among other things, the complainant argued that the federal income tax violated the rule of uniformity by effectively taxing certain corporations at a higher rate than individuals and partnerships on income “from precisely similar property or business.”<sup>106</sup> However, the issue became moot on rehearing after the Court held that provisions in the act imposing the federal income tax were unapportioned direct taxes.<sup>107</sup>

Five years later, in *Knowlton v. Moore*, the Supreme Court examined how the rule of uniformity applied to indirect taxes.<sup>108</sup> In *Knowlton*, the Court adopted a less restrictive reading of the Uniformity Clause,<sup>109</sup> holding that, in selecting the subject of an indirect tax, Congress could define the class of objects subject to the tax and make distinctions between similar classes.<sup>110</sup> The *Knowlton* Court ruled that an inheritance tax that exempted legacies and distributive shares of personal property under \$10,000, imposed a primary tax rate that varied based on the beneficiary’s degree of relationship to the decedent, and progressively raised tax rates on legacies and distributive shares as they increased in size did not violate the Uniformity Clause.<sup>111</sup> The Court held that the Uniformity Clause merely requires “geographical uniformity,” meaning indirect taxes must operate in the same manner throughout the United States.<sup>112</sup>

<sup>103</sup> *Ptasynski*, 462 U.S. at 85.

<sup>104</sup> Act of Aug. 27, 1894, ch. 349, 28 Stat. 509.

<sup>105</sup> *Pollock I*, 157 U.S. 429, 586 (1895); compare Act of Aug. 27, 1894, ch. 349, 28 Stat. 509, 553 (“That from and after the first day of January, eighteen hundred and ninety-five, and until the first day of January, nineteen hundred, there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried.” (emphasis added)), with *id.* at 556 (“That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized, but not including partnerships.” (emphasis added)).

<sup>106</sup> *Pollock I*, 157 U.S. at 555.

<sup>107</sup> See *Pollock II*, 158 U.S. 601, 637 (1895).

<sup>108</sup> 178 U.S. 41 (1900).

<sup>109</sup> *Id.* at 84–106; see *id.* at 96 (“The proceedings of the Continental Congress also make it clear that the words ‘uniform throughout the United States,’ which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, ‘to operate generally throughout the United States.’ The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. . . . The view that intrinsic uniformity was not then conceived is well shown.”).

<sup>110</sup> *Id.* at 83–110; see also *United States v. Ptasynski*, 462 U.S. 74, 82 (1983).

<sup>111</sup> *Knowlton*, 178 U.S. at 110; see *id.* at 83–84.

<sup>112</sup> *Id.* at 84 (explaining geographical uniformity “requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States”).

The Supreme Court further clarified the meaning of the Uniformity Clause in *United States v. Ptasynski*.<sup>113</sup> In *Ptasynski*, the Court ruled that the Crude Oil Windfall Profit Tax Act of 1980,<sup>114</sup> which made the windfall profit tax inapplicable to “exempt Alaskan oil,”<sup>115</sup> did not violate the Uniformity Clause despite the act’s inclusion of favorable treatment for a geographically defined classification.<sup>116</sup> The Court explained, “Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied. . . . But where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination.”<sup>117</sup> The Court held that the geographically defined classification was constitutional because Congress used “neutral factors” relating to the ecology, environment, and the remoteness of the location to conclude the exempt Alaskan oil classification merited favorable treatment.<sup>118</sup> Moreover, in the Court’s view Congress did not intend to grant Alaska “an undue preference at the expense of other oil producing states.”<sup>119</sup>

## Taxes for Federal Debts, Defense, or the General Welfare

The U.S. Constitution authorizes Congress to levy taxes “to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>120</sup> The U.S. Supreme Court has interpreted the term “debts” to include debts “of a strictly legal character” and “debts or claims which rest upon a merely equitable or honorary obligation.”<sup>121</sup> The Court has generally left it to Congress to determine whether a tax advances the “general welfare.”<sup>122</sup> However, the Supreme

<sup>113</sup> *Ptasynski*, 462 U.S. 74.

<sup>114</sup> Pub. L. No. 96-223, 94 Stat. 229 (1980).

<sup>115</sup> *Ptasynski*, 462 U.S. at 77; *see id.* at 77–78 (“[Exempt Alaskan oil] is defined as: ‘any crude oil (other than Sadlerochit oil) which is produced—(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.’ § 4994(e). Although the Act refers to this class of oil as ‘exempt Alaskan oil,’ the reference is not entirely accurate. The Act exempts only certain oil produced in Alaska from the windfall profit tax. Indeed, less than 20% of current Alaskan production is exempt. Nor is the exemption limited to the State of Alaska. Oil produced in certain offshore territorial waters—beyond the limits of any State—is included within the exemption.”).

<sup>116</sup> *Id.* at 85.

<sup>117</sup> *Id.* at 84–85.

<sup>118</sup> *Id.* at 85 (“Congress clearly viewed ‘exempt Alaskan oil’ as a unique class of oil that, consistent with the scheme of the Act, merited favorable treatment. It had before it ample evidence of the disproportionate costs and difficulties—the fragile ecology, the harsh environment, and the remote location—associated with extracting oil from this region. We cannot fault its determination, based on neutral factors, that this oil required separate treatment.”).

<sup>119</sup> *Id.* at 85–86 (“Nor is there any indication that Congress sought to benefit Alaska for reasons that would offend the purpose of the [Uniformity] Clause. Nothing in the Act’s legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States. This is especially clear because the windfall profit tax itself falls heavily on the State of Alaska. . . . Where, as here, Congress has exercised its considered judgment with respect to an enormously complex problem, we are reluctant to disturb its determination.”).

<sup>120</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>121</sup> *U.S. v. Realty Co.*, 163 U.S. 427, 440 (1896); *see, e.g., Cincinnati Soap Co. v. United States*, 301 U.S. 308, 315 (1937) (holding that an act of Congress that set apart revenue from a processing tax on coconut oil of Philippine production for the use of the Philippine Islands fell within the meaning of “debt” for the purposes of Article I, Section 8, clause 1 of the U.S. Constitution).

<sup>122</sup> Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 997 (2011); *see, e.g., Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (“The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle

Court has ruled that a tax will not cease to be valid solely because the amount of revenue it raises is negligible.<sup>123</sup>

## Taxes to Regulate Conduct

Congress uses the taxing power for more than just raising revenue. Congress also uses the taxing power to regulate conduct. Congress uses tax expenditures and tax penalties to accomplish its policy goals and to influence private behavior.<sup>124</sup> The U.S. Supreme Court has not invalidated a tax with a clear regulatory effect solely because Congress was motivated by a regulatory purpose.<sup>125</sup> In *National Federation of Independent Business v. Sebelius (NFIB)*, the Court reaffirmed that it construes the U.S. Constitution to prohibit Congress from using the taxing power to enact taxes that are functionally regulatory penalties as a means of regulating in areas that Congress cannot regulate directly through its other enumerated powers.<sup>126</sup> In a few cases decided in the 1920s and 1930s, the Court invalidated federal taxes that were functionally regulatory penalties on this basis.<sup>127</sup>

In *Bailey v. Drexel Furniture Co.* (commonly referred to as the *Child Labor Tax Case*), decided in 1922, the Supreme Court struck down a ten percent tax on the net profits of specified employers

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ground or certainly a penumbra in which discretion is at large. *The discretion, however, is not confided to the courts. The discretion belongs to Congress*, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. ‘When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.’ . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.” (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936) (emphasis added) (citations omitted)); *see also NFIB*, 567 U.S. 519, 674 (2012) (“Since [*Helvering v. Davis*], the Court has never held that a federal expenditure was not for ‘the general welfare.’”); *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987) (reviewing Congress’s spending power) (“The level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all.” (citing *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam))).

<sup>123</sup> *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (explaining a tax does not cease to be valid “even though the revenue obtained is obviously negligible, *Sonzinsky v. United States*, [300 U.S. 506 (1937)] or the revenue purpose of the tax may be secondary, *Hampton & Co. v. United States*, [ ] 276 U.S. 394 [(1928)].”); *see also United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953) (“The figure of \$ 4,371,869 [raised by the wagering tax], however, is relatively large when it is compared with [other taxes declared valid including] the \$ 3,501 collected under the tax on adulterated and process [sic] or renovated butter and filled cheese, the \$ 914,910 collected under the tax on narcotics, including marihuana and special taxes, and the \$ 28,911 collected under the tax on firearms, transfer and occupational taxes.”).

<sup>124</sup> Mason, *supra* note 122, at 977–78 (“Congress uses two kinds of tax incentives to regulate private actors. Tax subsidies or ‘tax expenditures’ are tax laws that offer special tax deductions, credits, and other tax benefits designed to accomplish public policy goals. . . . Tax penalties are special tax code provisions that increase the normal tax burden. Like tax expenditures, Congress designs tax penalties to influence taxpayer behavior.”); *see NFIB*, 567 U.S. at 544 (noting the difference between tax statutes describing exactions as penalties and penalties for constitutional purposes—taxes that are functionally regulatory penalties that are impermissible when solely relying on Congress’s authority to regulate under the taxing power).

<sup>125</sup> *See, e.g., United States v. Doremus*, 249 U.S. 86, 93 (1919) (“[F]rom an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.”); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 167 (1911) (“[T]he right to select the measure and objects of taxation devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped.”); *McCray v. United States*, 195 U.S. 27, 59 (1904) (“[T]he motive or purpose of Congress in adopting acts in question may not be inquired into.”); *see Metzger, supra* note 2, at 90.

<sup>126</sup> 567 U.S. at 572–73.

<sup>127</sup> *See, e.g., United States v. Butler*, 297 U.S. 1 (1936); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

who knowingly employed child labor.<sup>128</sup> The Court invalidated the child labor tax as a penalty exceeding the scope of Congress’s enumerated powers and aiming to achieve a regulatory purpose “plainly within” the exclusive powers reserved to the states under the Tenth Amendment.<sup>129</sup> Four characteristics of the tax led the Court to conclude the tax was a penalty: (1) the tax was conditioned on noncompliance with a specific and detailed course of conduct regarding the use of child labor; (2) the tax was not commensurate with the degree of the infraction—i.e., a small departure from the prescribed course of conduct could feasibly lead to the ten percent tax on net profits; (3) there was a scienter requirement—the tax was conditioned on an employer knowing he employed an underage laborer; and (4) the Department of Labor, an agency traditionally responsible for enforcing labor laws as opposed to tax laws, could enforce the course of conduct prescribed by the tax.<sup>130</sup> The Court distinguished the child labor tax from acceptable regulatory taxes by emphasizing that in those cases Congress had authority outside the taxing power to regulate those activities.<sup>131</sup>

In 1935, in *United States v. Constantine*, a divided U.S. Supreme Court struck down a federal excise tax on liquor dealers selling liquor in violation of state laws.<sup>132</sup> The Court read the U.S. Constitution to prohibit Congress from imposing an excise tax on liquor dealers when the purpose of the tax was to punish rather than raise revenue, because Congress lacked authority to impose a penalty on liquor dealers following the repeal of the Eighteenth Amendment.<sup>133</sup> The Court

<sup>128</sup> 259 U.S. at 37; *see also* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding Congress lacked authority to regulate child labor under the Commerce Clause).

<sup>129</sup> *Drexel Furniture*, 259 U.S. at 39–43; *see* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *see also* *Drexel Furniture*, 259 U.S. at 37–38 (“Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control and one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word ‘tax’ would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.”).

<sup>130</sup> *Drexel Furniture*, 259 U.S. at 36–37 (“[T]his act is more [than a tax]. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienter is associated with penalties not with taxes. The employer’s factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed.”).

<sup>131</sup> *Id.* at 40–44.

<sup>132</sup> 296 U.S. 287 (1935).

<sup>133</sup> *Id.* at 293–94 (“The repeal of the Eighteenth Amendment renders it necessary to determine whether the exaction is in fact a tax or a penalty. If it was laid to raise revenue its validity is beyond question, notwithstanding the fact that the conduct of the business taxed was in violation of law. The United States has the power to levy excises upon occupations, and to classify them for this purpose . . . . The question is whether the exaction of \$1,000 in addition, by reason solely of his violation of state law, is a tax or a penalty? If, as the court below thought, [the excise tax] was part of the enforcing machinery under the Amendment, it automatically fell at the moment of repeal. But even though the

emphasized the following features of the excise tax as evidence that its purpose was to impose a penalty rather than raise revenue: (1) the \$1,000 excise was “highly exorbitant” and “grossly disproportionate” to the \$25 normal tax on retail liquor dealers; and (2) the tax was conditioned on the commission of a crime.<sup>134</sup> The majority concluded that Congress exceeded its authority by penalizing liquor dealers for violating state law, because such regulation was reserved, under the Tenth Amendment, to the states.<sup>135</sup> The majority expressed that allowing the federal government to impose penalties for violating state law would “obliterate the distinction between the delegated powers of the federal government and those reserved to the states.”<sup>136</sup>

The next year, in *United States v. Butler*, the U.S. Supreme Court struck down another federal tax because the tax infringed on powers reserved to the states under the Tenth Amendment.<sup>137</sup> In *Butler*, the act at issue included a tax on agricultural producers to raise funds to subsidize certain crops and control agricultural commodity prices.<sup>138</sup> The Court ruled that Congress did not hold the power to regulate the “purely local activity”<sup>139</sup> of controlling agricultural production, because the power to regulate local activity was reserved to the states.<sup>140</sup>

The Supreme Court has limited the applicability of these nearly 100-year-old decisions.<sup>141</sup> In later cases, the Court upheld regulatory taxes without specifying whether Congress had authority to regulate the activity subject to tax under its other enumerated powers.<sup>142</sup> For instance, in *Sonzinsky v. United States*, the Court rejected a challenge to a federal license tax on dealers,

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statute was not adopted to penalize violations of the Amendment, it ceased to be enforceable at the date of repeal, if, in fact, its purpose is to punish rather than to tax. The only color for the assertion of congressional power to ordain a penalty for violation of state liquor laws is the Eighteenth Amendment, which gave to the federal government power to enforce nation-wide prohibition.”); *see also* U.S. CONST. amend. XVIII (“After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”).

<sup>134</sup> *Constantine*, 296 U.S. at 295.

<sup>135</sup> *Id.* at 295–96.

<sup>136</sup> *Id.* at 296.

<sup>137</sup> 297 U.S. 1 (1936).

<sup>138</sup> *Id.* at 56; Mason, *supra* note 122, at 1000. In reaching its decision, the Court’s analysis highlighted the tax’s departure from the general understanding of the term “tax” as used in the Constitution. *Butler*, 297 U.S. at 61; *see id.* at 67. The Court explained the term “tax” connotes an “exaction for the support of the Government” as opposed to an “expropriation of money from one group from another.” *Id.* at 61. The Court conceded such a tax may be constitutional “when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation.” *Id.*

<sup>139</sup> *Butler*, 297 U.S. at 63–64 (“[The act’s] stated purpose is the control of agricultural production, a purely local activity, in an effort to raise the prices paid the farmer. *Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause*, which, for the purpose of the present case, may be put aside as irrelevant.” (emphasis added)).

<sup>140</sup> *Id.* at 68–69.

<sup>141</sup> *See NFIB*, 567 U.S. 519, 572–73 (2012) (“Congress’s ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise *regarded at the time as beyond federal authority*. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. We have nonetheless maintained that ‘there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.’” (emphasis added) (citations omitted) (quoting *Bailey v. Drexel Furniture Co.*, 259 U.S. 38, (1922))).

<sup>142</sup> Mason, *supra* note 122, at 1066; *see NFIB*, 567 U.S. at 567 (“Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns.” (citing *Sonzinsky v. United States*, 300 U.S. 506 (1937) and *United States v. Sanchez*, 340 U.S. 42 (1950))).

importers, and manufacturers of certain firearms.<sup>143</sup> The petitioner alleged the tax was “a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states.”<sup>144</sup> The Court explained:

Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.<sup>145</sup>

Similarly, in *United States v. Sanchez*, the U.S. Supreme Court upheld a tax on unregistered transfers of marijuana that was challenged based on its penal nature.<sup>146</sup> In upholding the tax, the Court remarked, “It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.”<sup>147</sup> Moreover, the Court stated, “Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.”<sup>148</sup>

In *NFIB*, the U.S. Supreme Court confirmed that the taxing power provides Congress with the authority to use taxes to carry out regulatory measures that might be impermissible if Congress enacted them under its other legislative powers.<sup>149</sup> In *NFIB*, the Court upheld the constitutionality of a provision in the Patient Protection and Affordable Care Act<sup>150</sup> requiring individuals to either purchase minimum health insurance (commonly referred to as the “individual mandate”) or pay a “penalty” in lieu of purchasing minimum health insurance.<sup>151</sup> Despite being labeled a penalty in the statute, the Court held the payment due in lieu of purchasing minimum health insurance (the exaction) was a constitutionally permissible use of Congress’s authority under the taxing

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<sup>143</sup> 300 U.S. at 512.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 513–14.

<sup>146</sup> 340 U.S. at 44 (1950).

<sup>147</sup> *Id.* at 44.

<sup>148</sup> *Id.*

<sup>149</sup> 567 U.S. 519, 571–72 (2012) (casting doubt on Congress’s authority to enact the individual mandate provision under the Commerce Clause); *see id.* at 546–61 (opinion of Roberts, C.J.) (finding neither the Commerce Clause nor the Necessary and Proper Clause provides Congress with the authority to enact the individual mandate); *id.* at 647–61 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (finding the Commerce Clause does not provide Congress with the authority to enact the individual mandate).

<sup>150</sup> 26 U.S.C. § 5000A.

<sup>151</sup> *NFIB*, 567 U.S. at 574 (majority opinion).

power.<sup>152</sup> More specifically, the Court ruled the exaction was a tax not a penalty for constitutional purposes, and thus the exaction was not impermissibly regulatory under the taxing power.<sup>153</sup>

The Court applied a functional approach that looked at the exaction’s “substance and application” to conclude the exaction was not a penalty for constitutional purposes.<sup>154</sup> The Court found that the exaction “look[ed] like a tax in many respects.”<sup>155</sup> The Court observed that the exaction is located in the Internal Revenue Code (IRC); the requirement to pay the exaction is located in the IRC; the Internal Revenue Service (IRS) enforces the exaction; the IRS assesses and collects the exaction “in the same manner as taxes”; the exaction does not apply to individuals who do not owe federal income taxes because their income is less than the filing threshold; taxpayers pay the exaction to the Treasury’s general fund when they file their tax returns; the exaction is based on “such familiar factors” as taxable income, filing status, and the number of dependents; and the exaction “yields the essential factor of any tax: it produces a least some revenue for the government.”<sup>156</sup>

The Court distinguished the exaction in *NFIB* from its past precedent in which it held Congress lacked authority under the taxing power to use penalties disguised as taxes to regulate activities that it could not regulate directly through its other enumerated powers.<sup>157</sup> The case mainly discussed in the majority opinion is *Bailey v. Drexel Furniture Co.*<sup>158</sup> The Court found that three of the four characteristics that it had used in *Drexel Furniture Co.* to conclude the child labor tax was a penalty for constitutional purposes were not present with respect to the individual mandate provision at issue in *NFIB*.<sup>159</sup> Unlike *Drexel Furniture Co.*, the Court found: (1) the exaction was not “prohibitory” because the exaction was “far less” than the cost of insurance; (2) there was no scienter requirement—the exaction was not levied based on a taxpayer’s knowledge of wrongdoing; and (3) the IRS collected the exaction and the IRS was prohibited from using “those means most suggestive of a punitive sanction, such as criminal prosecution.”<sup>160</sup>

Additionally, in distinguishing penalties from taxes for constitutional purposes, the Court explained that, “if the concept of penalty means anything, it means punishment for an unlawful act or omission.”<sup>161</sup> While the Court acknowledged that the purpose of the individual mandate provision was to encourage the purchase of health insurance, the Court found the individual mandate provision “need not be read to” make the failure to purchase health insurance unlawful.<sup>162</sup> As evidence of this, the Court emphasized that, besides the exaction itself, there were no additional “negative legal consequences” for failure to purchase health insurance.<sup>163</sup>

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<sup>152</sup> *Id.*; see 26 U.S.C. § 5000A(b)(1) (“[T]here is hereby imposed on the taxpayer a penalty with respect to such failures.”). The penalty in lieu of purchasing health insurance is currently zero. Whether the penalty in lieu of purchasing minimum health insurance remains a tax for constitutional purposes, and accordingly, whether the individual mandate remains constitutional are questions currently pending before the Supreme Court. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom. California v. Texas*, 140 S. Ct. 1262 (2020).

<sup>153</sup> *NFIB*, 567 U.S. at 572–74.

<sup>154</sup> *Id.* at 565 (quoting *United States v. Constantine*, 296 U.S. 287, 294 (1935)).

<sup>155</sup> *NFIB*, 567 U.S. at 563.

<sup>156</sup> *Id.* at 563–64.

<sup>157</sup> *Id.* at 564–68.

<sup>158</sup> 259 U.S. 20 (1922).

<sup>159</sup> *NFIB*, 567 U.S. at 565–66.

<sup>160</sup> *Id.* at 566.

<sup>161</sup> *Id.* at 567 (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

<sup>162</sup> *NFIB*, 567 U.S. at 567–68.

<sup>163</sup> *Id.* at 568.

## **Conclusion**

The Framers envisioned a broad taxing power to support the national government and formulated constitutional provisions to bring about that vision. Since the Nation's founding, judicial precedents have sustained Congress's extensive power to tax. The U.S. Supreme Court has helped ensure the power to tax is subject to few limitations. Taxpayers have made constitutional challenges to the manner in which Congress has imposed taxes based on express limitations in the U.S. Constitution. That said, even where those challenges succeeded in invalidating taxes, Congress has found alternative ways to achieve similar results, whether Congress's aim is raising revenue or implementing a regulatory scheme.

## **Author Information**

Milan N. Ball  
Legislative Attorney

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